[illegible]

[illegible] Court of the United States

October Term, [illegible]

[illegible] Freight, Inc.; Chicago Express, [illegible] Express, Inc.; Long Transportation [illegible]; W. L. Mead, Inc.; Ramos Trucking, Inc.; [illegible] Roadway Express, Inc.; Spector [illegible], Inc.; The Western Express Company; Wilson Freight Forwarding Company; and [illegible] Central Motor Carriers Association, Inc., *Appellants*

v.

The New York, New Haven and Hartford Railroad Company, (Richard Joyce Smith, William J. Kirk and Henry W. Dorigan, Trustees) Et Al., *Appellees*

On Appeal from the United States District Court for the District of Connecticut

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JURISDICTIONAL STATEMENT

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December 31, 1963

Press of Byron S. Adams, Washington, D. C.

INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

ALL STATES FREIGHT, INC.; CHICAGO EXPRESS, INC.; EASTERN EXPRESS, INC.; LONG TRANSPORTATION COMPANY; W. L. MEAD, INC.; RAMUS TRUCKING LINE, INC.; ROADWAY EXPRESS, INC.; SPECTOR FREIGHT SYSTEM, INC.; THE WESTERN EXPRESS COMPANY; WILSON FREIGHT FORWARDING COMPANY; and THE EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC., *Appellants*

v.

THE NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY, (Richard Joyce Smith, William J. Kirk, and Henry W. Dorigan, Trustees) ET AL., *Appellees*

On Appeal from the United States District Court for the District of Connecticut

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the District of Connecticut was handed down on July 23, 1963, is reported at 221 F. Supp. 370, and is set forth in Appendix A hereto. The order entered by the Court is reproduced as Appendix B hereto. The

decision of the Interstate Commerce Commission, reported at 315 I.C.C. 419, is set forth as Appendix C hereto.

JURISDICTION

The suit was brought under 28 U.S.C. §§ 1336, 1398, 2284, 2321 through 2325 and 5 U.S.C. § 1009 to set aside and annul a report and order of the Interstate Commerce Commission. The order of the three-judge District Court (Appendix B) was entered on September 16, 1963, and Notice of Appeal was filed in that Court by appellants here on November 2, 1963.

The jurisdiction of the Supreme Court to review this decision on direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b) and is sustained by the following decisions: *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956); *American Trucking Assos.* v. *Frisco Transp. Co.*, 358 U.S. 133 (1958); *Minneapolis & St. L. R. Co.* v. *United States*, 361 U.S. 173 (1959); *United States* v. *Drum*, 368 U.S. 370 (1962); and *Interstate Commerce Com.* v. *J-T Transport Co.*, 368 U.S. 81 (1961).

STATUTES INVOLVED

The provisions of the Interstate Commerce Act pertinent to this proceeding are as follows:

National Transportation Policy, 49 U.S.C. preceding §§ 1, 301, 901, and 1001

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation

and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 1(6) of the Interstate Commerce Act, 49 U.S.C. 1(6).

"It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classifi-

cation, regulation, and practice is prohibited and declared to be unlawful."

Section 1(5) of the Interstate Commerce Act, 49 U.S.C. 1(5)

"All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 2 of the Interstate Commerce Act, 49 U.S.C. 2

"That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1)

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference, or advantage to any particular person, company, firm, corporation, association, locality, port,

port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Section 15a(3) of the Interstate Commerce Act, 49 U.S.C. 15a(3)

"In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act."

QUESTIONS PRESENTED

1. Whether the Court acted properly in setting aside the order of the Interstate Commerce Commission upon the ground that the Commission has already effectively legislated the modification of the meaning and purpose of Section 1(6) and ought not now to "boggle"[1] at the final step.

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[1] Decision of the court below, 221 F. Supp. at p. 375, Appendix A hereto, p. 10a, *infra*.

2. Whether a finding by the Court below of changed economic conditions is a proper basis for setting aside the Interstate Commerce Commission order which applied the statute as enacted by Congress.[2]

3. Whether the Court below properly substituted its judgment for that of the Interstate Commerce Commission as to the effect of a rate proposal upon the historic rate structure of the carriers while, at the same time, ignoring the factual findings of the Commission upon which that agency's judgment was predicated.

4. Whether the Court acted properly in setting aside as unsupported the decision of the Interstate Commerce Commission which held the rate proposal under investigation to constitute a destructive competitive practice where the evidence showed and the Commission found that the proposed rates would adversely affect the proponent thereof as well as competing carriers.

5. Whether the Court acted properly in setting aside an order of the Interstate Commerce Commission upon the ground that the Commission's jurisdiction may be adequately exercised under provisions of law other than one upon which the Commission's order was based.

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[2] Thus, the Court below is in direct conflict with the three-judge Court in *Pennsylvania Truck Lines, Inc.* v. *United States*, 219 F. Supp. 871 (W.D., Pa. 1963) which sustained a decision of the Interstate Commerce Commission saying (219 F. Supp. at p. 875):

> "While there may be some merit to the plaintiff's contention that changed conditions in the transportation industry since the enactment of the Interstate Commerce Act requires a reassessment of the National Transportation Policy with respect to railroads, this Court should not become the vehicle for reshaping the laws which Congress has written. The plaintiffs' appeal in that regard must be to Congress itself. The complaint must be dismissed."

STATEMENT

About the middle of the year 1959 the New Haven Railroad, followed for competitive reasons by the other railroads serving New England, published in tariffs filed with the Interstate Commerce Commission new "all-freight" rates applying upon shipments of straight carloads of virtually any commodity moving in interstate commerce. Said rates, stated in cents per hundred-weight, varied in accordance with the weights of the carloads shipped, ranging from the highest rates applicable to shipments of 20,000 pounds to the lowest applicable to shipments of 70,000 pounds. They applied from New England origins to Chicago, Illinois, and St. Louis, Missouri. By reason of their virtually all-inclusive character, they defeated and thereby supplanted all other and higher rates published by the railroads to apply upon specified commodities, described commodity groupings, and other categories of articles grouped for rate-making purposes. The purpose of the proposed rates, as stated by the New Haven, was to compete with the trailer-on-flatcar service of other railroads and to attract to itself and retain high-grade tonnage which might otherwise move by truck. As already observed, the other railroads serving New England filed equivalent rates in order to stay competitive with the New Haven.

After hearings and extended pleadings by the parties, the entire Interstate Commerce Commission upon reconsideration found the considered rates unlawful and ordered their cancellation. Two bases for the findings were specified:

(1) The rates are violative of the requirement of Section 1(6) of the Act that the railroads estab-

lish, observe, and enforce just and reasonable classifications of property for transportation with reference to which rates are or may be made or prescribed; and

(2) Actual experience under the rates had demonstrated that they constituted a destructive competitive practice in violation of the prohibition of the National Transportation Policy in that although additional traffic had been attracted, there had been virtually no increase in gross revenues.

The United States District Court for the District of Connecticut set aside the Commission's order on the ground that the provisions of Section 1(6) of the Interstate Commerce Act have no bearing in this instance and that the issues ought never to have been framed thereunder; that Sections 1(5), 2, and 3 of the Interstate Commoner Act [49 U.S.C. §§ 1(5), 2, and 3] vest the Commission with ample powers to regulate rates and charges without reference to Section 1(6); that by past administrative decisions the Commission has effectively legislated a modification of Section 1(6) and ought not now to "boggle" at the final administrative repeal thereof; that in any event Section 15a(3) [49 U.S.C. § 15a(3)] forecloses the Commission from condemning the "all-freight" rates inasmuch as they have been shown to produce revenues in excess of out-of-pocket costs; and that even though by its terms the National Transportation Policy pervades the entire Act, its proscription of destructive competitive practices should not have been invoked by the Interstate Commerce Commission in this instance.

THE QUESTIONS ARE SUBSTANTIAL

This proceeding presents issues of nationwide significance which are of tremendous importance to the regulation of all transportation in interstate and foreign commerce. The decision of the Court below plainly lays down a new interpretation of the Interstate Commerce Act, said by the Court to be made necessary by reason of changed economic circumstances and past legislative modification through administrative decisions. Moreover, the decision of the Court below clearly holds that the meaning of the Interstate Commerce Act not only may but should be modified to fit the economic circumstances existing at the time of decision—in short, a rule by men rather than a rule by law.[3] Finally, the Court below has ignored the findings by the entire Commission that during the period in which the effect of the "all-freight" rates upon the revenues of the New Haven Railroad had been studied, that railroad had transported more than 4,000,000 pounds of additional traffic in return for only $129 in added gross revenue. In the face of that factual finding, the Court below overturned the Commission's conclusion that the rates constitute a destructive competitive practice.

In *New York, New Haven and Hartford Railroad Co.* v. *United States,* 199 F. Supp. 635 (1961), vacated 372 U.S. 744 (1963), the same Court below set aside an order of the Interstate Commerce Commission for the reason, among others, that it was predicated upon the "value of service concept" of ratemaking which the Court below condemned as among the "official discriminations, hallowed and encrusted

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[3] This holding is directly contrary to that in *Pennsylvania Truck Lines, Inc.* v. *United States,* 219 F. Supp. 871, 875 (W.D. Pa. 1963).

by time and inertia (which) now pervade the rate structure." The Supreme Court in its opinion in *I.C.C.* v. *New York, N.H.&H.R. Co.*, ... U.S. ...., 10 L. Ed. 2d 108, (1963), specifically withheld consideration of that discussion. The Court below now invokes the same hypothesis to support another condemnation by it of a decision by the Interstate Commerce Commission. This has been done by the Court below in spite of the fact that the provisions of Section 1(6) of the Interstate Commerce Act require the maintenance by the railroads of rates which must have a just and reasonable relationship to each other (classifications) to reflect the almost infinite variation between and among the articles and commodities which are transported in interstate commerce.

All-freight rates applicable on straight as opposed to mixed shipments are unlawful because differential pricing of transportation is required by the Act, whether such pricing reflects value of service or some other consideration. And differential pricing is a necessity if the opinion of the Supreme Court in *Baltimore & Ohio Railroad Co.* v. *United States*, 345 U.S. 146 (1953), is to have any significance. There, the Court sustained an order of the Interstate Commerce Commission which required the railroads to transport certain kinds of fresh vegetables at charges which were below the computed out-of-pocket costs of such transportation, the Court holding that this was lawful if the total traffic of the railroads was sufficiently profitable to assure continued service.

It follows, of course, that if the Commission has the power to require the railroads to transport a given segment of traffic at less than cost, the Commission must likewise have the power to require the railroads

to transport other traffic at rates substantially in excess of cost so that the ability of the railroads to meet the nation's needs with respect to the first category of traffic will be preserved. That is why Section 1(6) of the Interstate Commerce Act makes it "the duty of all common carriers * * * to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations or practices are or may be made or prescribed * * *." It is likewise why Section 2 of the Interstate Commerce Act makes it unlawful for any railroad "by any * * * device" to "charge * * * or receive from any person * * * a greater or less compensation for any service rendered, or to be rendered, in the transportation of * * * property * * * than it charges * * * or receives from any other person * * * for * * * a like and contemporaneous service in the transportation of *a like kind of traffic* under substantially similar circumstances and conditions." (Emphasis ours) It is likewise why Section 3(1) of the Act makes it unlawful for any railroad "to make, give or cause any undue or unreasonable preferences or advantages to * * * any particular *description of traffic* * * * or to subject * * * *any particular description of traffic* to any undue or unreasonable preference or disadvantage in any respect whatsoever." (Emphasis ours)

The Supreme Court has itself heretofore interpreted the Interstate Commerce Act as not only authorizing but requiring the Interstate Commerce Commission to see to it that the railroads maintain rates and charges which are just, reasonable, non-discriminatory, and non-preferential as between the various classes of traffic and the various classes and kinds of commodities. That was the thrust of the decision in *Ann Arbor R. Co.* v.

United States, 281 U.S. 658 (1930), which held that the Hoch-Smith Resolution, 49 U.S.C. § 55, had merely restated the requirements of the Interstate Commerce Act in that regard. The Commission itself called attention to this matter in its own report accompanying its order requiring that the rates under consideration be cancelled.

The report and order of the Commission which the Court below set aside was concurred in by a majority of eight of the eleven Commissioners. The view of that majority that the meaning and purpose of Section 1(6) of the Interstate Commerce Act [49 U.S.C. § 1(6)] has been clearly spelled out by the Supreme Court and must be reflected in the administrative policies of the Commission regardless of changed economic circumstances and hard problems of carrier competition was directly challenged by dissenting Commissioner Webb who, at the very close of his comments, said:[4]

> "A good argument can always be made for the proposition that the settled policies of the Interstate Commerce Commission, whether the result of action or inertia, should be altered only by the Congress. The better view, in my opinion, is that the Congress, in delegating authority couched in such broad terms as 'just and reasonable,' intended the Commission to adjust its regulation in the light of changes in the industry and, whenever deemed necessary, to scuttle outmoded theories and practices without regard to their antiquity. * * *"

The Court below has gone further than Commissioner Webb and has held that the Commission not only can but also must complete the job of legislative modification of Section 1(6) of the Interstate Commerce Act

[4] 315 I.C.C. at p. 433.

[49 U.S.C. § 1(6)]. The court said as much when it stated at pages 374 and 375 of its opinion:

> "The Commission fears that approval of these rates would be legislation on its part, apparently because it would be the final blow to classification as a control over minimum rates and a further weakening of its role as a 'giant handicapper.' Having permitted over a long period exceptional rates which actually move the vast preponderance of this traffic at rates below the class rates, it would seem that it has already effectually legislated or interpreted the modification of what it now claims was the original meaning and purpose of § 1(6). It is strange to find it boggling at this final step of so little effect on traffic actually moving under class rates. In any case, we do not agree that these rates are or ever were a violation of the language or intent of section 1(6). Commodity rates are sufficiently policed under sections 1(5); 2; 3(1); and 15a(3). The record discloses no violation of these sections. It would appear that the Commission here invokes § 1(6) as a means of preserving a basis for the 'value of service' concept in ratemaking referred to above, in a desire to hold fast to a past which has already slipped away beyond our reach."

If the provisions of the Interstate Commerce Act are to be legislatively modified, it should be by the Congress of the United States and not by the Interstate Commerce Commission or, for that matter, by the United States District Court for the District of Connecticut.

CONCLUSION

The questions presented by this appeal are substantial and are of sufficient public importance as to re-

quire plenary consideration with briefs and oral argument for their resolution.

Respectfully submitted,

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December 31, 1963

APPENDIX A

The New York, New Haven and Hartford Railroad Company (Richard Joyce Smith, William J. Kirk, and Harry W. Dorigan, Trustees), et al., *Plaintiffs*,

v.

United States of America and Interstate Commerce Commission, *Defendants*.

Civ. A. No. 9229.

United States District Court
D. Connecticut.

July 23, 1963.

* * * * * * * * * *

Thomas P. Hackett, Eugene E. Hunt, New Haven, Conn., Edward A. Kaier, Philadelphia, Pa., for plaintiff.

John S. Fessenden, Homer S. Carpenter, Washington, D. C., Robert J. Gillooly, New Haven, Conn., for defendants.

John H. D. Wigger, Atty., Dept. of Justice, Washington, D. C., Lee Loevinger, Asst. Atty. Gen., Robert C. Zampano, U. S. Atty., for the United States.

Robert W. Ginnane, Gen. Counsel, Fritz R. Kahn, Asst. Gen. Counsel, Interstate Com. Commission, Washington, D. C., for I. C. C.

Before Smith, Circuit Judge, Anderson, Chief District Judge, and Blumenfeld, District Judge.

J. Joseph Smith, Circuit Judge.

This is an action under 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325,[1] and 5 U.S.C. § 1009, in which the New York,

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[1] "§ 1336. Interstate Commerce Commission's orders

"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin,

set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

"§ 1398. Interstate Commerce Commission's orders

"Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action."

"§ 2284. Three-judge district courts; composition; procedure

"In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

"If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

"Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and

tions seek to set aside and annul a report and order of the Interstate Commerce Commission in Investigation and

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identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and, in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State."

"§ 2321. Procedure generally; process

"The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

"The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States."

"§ 2322. United States as party

"All actions specified in section 2321 of this title shall be brought by or against the United States."

"§ 2323. Duties of Attorney General; intervenors

"The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under

Suspension Docket No. 7131, *All commodities from New England to Chicago and St. Louis*, in which the Commission, three commissioners dissenting, overruled a report and order of its Division 2, and struck down so-called all-commodity rates on mixed or straight shipments of manufactured articles published by the New Haven and other plaintiffs, finding the rates to be a destructive competitive practice and unjust and unreasonable in violation of sec-

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sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

"The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

"Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

"The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein."

"§ 2324. Stay of Commission's order

"The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action."

"§ 2325. Injunction; three-judge court required

"An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

tion 1(6) of the Interstate Commerce Act, 49 U.S.C. § 1(6), Act of June 18, 1910, c. 309, § 7, 36 Stat. 544. We find the Commission's order unlawful because based on an erroneous interpretation of § 1(6) of the Act and order it set aside and annulled.

The New Haven, faced with loss of traffic to highway carriage and TOFC (trailer on flatcar carriage) which latter it was not in a favorable position to handle extensively because of equipment and clearance difficulties, and plagued with a large tonnage of empty boxcars moving West, devised a schedule of reduced boxcar rates on freight in straight or mixed carloads from points in New England territory to Chicago and East St. Louis, Illinois, Gibson and Hammond, Indiana, and St. Louis, Missouri, and filed appropriate tariffs containing these rates. Competing railroads followed suit. Eastern Central Motor Carriers Association, Inc. filed protests and petitions for suspension of the New Haven schedules. Later, 10 of its member carriers joined in the protests. The Commission suspended the schedules and instituted investigations. Subsequently, on petition of the New Haven and certain intervening shippers the suspension was vacated and the rates became effective July 16, 1959, the investigation, however, proceeding to its conclusion December 28, 1961 in the order under review.

The Commission's principal argument in support of its order is the asserted violation of § 1(6) of the Act and its claimed destructive effect on the general rate structure. Under § 1(6), it is "the duty of all common carriers * * * to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or proscribed * * * and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful." Under this provision all carriers subject to the Act publish classifications,

in groupings, of all commodities subject to transportation, and tariffs, that is rates per hundred pounds, at which articles in each classification grouping will be carried between any two points. These are the class rates. The characteristics of the commodities considered in fixing classification ratings are generally:

1. Shipping weight per cubic foot.
2. Liability to damage.
3. Liability to damage other commodities with which it is transported.
4. Perishability.
5. Liability to spontaneous combustion or explosion.
6. Susceptibility to theft.
7. Value per pound in comparison with other articles.
8. Ease or difficulty in loading or unloading.
9. Stowability.
10. Excessive weight.
11. Excessive length.
12. Care or attention necessary in loading and transporting.
13. Trade conditions.
14. Value of service.
15. Competition with other commodities transported.

The most important are density of the item (light, bulky goods are charged more per 100 pounds as it takes more cars to carry a given tonnage), perishability, difficulty in handling, and value of service. Under the latter, commodities of higher value, whose transportation characteristics were otherwise no different from those of lower value have historically been charged higher rates. The semimonopoly position of the railroads allowed them to do this well into this century. By exacting a premium charge from high-priced commodities, the railroads were enabled to carry low-priced goods at rates not much above the out-of-pocket costs of carriage. Many times, these low rates were necessary as the lower-priced goods could not

compete in the market to which they were brought unless the transportation costs were low. Otherwise, they would not move at all, and the traffic was desirable for the railroad as it did contribute something towards overhead. Common carrier and private trucks have today skimmed off most of the high-rated traffic, leaving the railroads with the unprofitable freight and resulting deficits.

A second type of rate is the commodity rate. This is often described as a "concession to a particular situation" (Commission Brief, p. 14) or in some other terms implying that it is an extraordinary deviation from the normal pattern of class rates. It is a particular price quoted for freight of a particular kind from one place to another. It is lower than the class rates, and set to meet competition (either rail or by other carrier) that would otherwise take away the traffic. It is not a recent innovation, but seems historically to have always been part of the rate structure. See ICC 17th Ann. Rep. pp. 115-16 (1903). Thus, its status as exceptional is questionable. Further, commodity rates appear to have largely superseded the class rates. Only about 1 (one) percent of all railroad carload tonnage in the East moves on class rates.

All-commodity rates (sometimes called all-freight rates) are a natural outgrowth of the rate structure. Since cost of handling is greater, rates on less-than-carload-lots (LCL) are higher per hundred pounds than rates on carload lots. This appears to be true of both class and commodity rates. Shippers thus tried to tender carload lots for shipment. The problem arose when a shipment of mixed articles was tendered. Unless the articles were of the same class, the shipper was at first charged the LCL rate on each item, thus paying high charges for what was actually more like carload service. To remedy this, the mixing rule (Rule 10) was instituted, allowing shipment of a mixed carload at the carload rate and minimum weight of the highest class of article. This concession

permitted the growth of the freight forwarders. They operated by collecting LCL shipments and shipping them at the carload rate, making a profit out of the difference between the carload rate they were charged and the LCL rate which was approximately their charge to the original shipper. With the growth of motor carriers, the railroads began to lose this freight to them—both the LCL shipments and the freight forwarder shipments moved increasingly by truck. The railroads countered with rates for truck bodies, containers (holding any goods), and rates for all-commodities, regardless of their class. The Commission found little difficulty approving this kind of all-commodity rates, especially since they were generally either subject to a mixing rule (e. g., no more than 60% by weight of a shipment may be of one commodity) or were higher than the carload class rates that would otherwise have applied. All-Commodity Rates Between California and Oregon, Washington, 293 ICC 327 (1954); All Freight, Straight Carloads, To and From the South, 258 ICC 579 (1944); All Freight from Butte, Mont., to Spokane, Wash., 257 ICC 291 (1942); All-Freight Rates to Points in Southern Territory, 253 ICC 623 (1942); All Freight to Pacific Coast, 248 ICC 73 (1941), aff'd sub nom. Pacific Inland Tariff Bureau v. United States, 50 F. Supp. 376 (W.D. Wash. 1943); All Freight from Chicago and St. Louis to Santa Rosa, N. Mex., 243 ICC 517 (1941); All Freight Between Harlem River, N. Y. and Boston, 234 ICC 673 (1939); All Freight Between St. Louis and Kansas City, 234 ICC 589 (1939); All Freight from Chicago and St. Louis to Birmingham, 226 ICC 455 (1938); Commodities Between Chicago, Ill. and Twin Cities, 226 ICC 356 (1938). All-commodity rates on straight shipments (no mixing rule) thus almost never supplanted the classifications or the commodity rates on carloads then in force, except for the LCL freight, and the railroads themselves at that time had no intention of generally superseding the existing rates. See All Freight, Straight Carloads, To and From the

South, 258 ICC 579 (1944). The all-commodity rate was thought of as meeting this particular problem only.

The present rate is an advance only in that it is lower than the existing class and commodity rates, and is intended to apply to the exclusion of those rates on the commodities that it covers. But it is not what the layman would call "all-commodity" either. It excludes anything that cannot be carried in a boxcar—this is obviously a substantial number of things; it is graduated according to minimum weight per car, denser items thus paying less per hundred pounds as has always been true; it excludes perishables, easily damaged goods, explosives, and other such goods whose cost of handling might be extreme; it applies only to freight westward; and there are other exclusions on basis of cost of shipment and handling.

The just and reasonable classification requirement of § 1(6) was adopted in 1910 to give the Commission power to control classification, there being some doubt as to the existence of the power, and its purpose was to protect shippers by controlling the maximum charges for transportation of commodities. This purpose is fulfilled by the maintenance in being of class rates even though competitive conditions lead to the furnishing of service through variously constructed rates at lower charges. The practice of the Commission over the past 21 years, as pointed out by Commissioner Webb in his dissent in the instant case, was consistent with this interpretation, permitting competitively compelled departures from the classification in e. g. All Freight to Pacific Coast, 248 ICC 73, aff. Pacific Inland Tariff Bureau v. United States, 50 F. Supp. 376 (W.D. Wash. 1943), and cases cited, supra, [sic] We can see no difference in principle between those cases and the one before us and no sound reason for so interpreting § 1(6) as to prohibit such competitively compelled departures from classifications, within the established maxima, absent some

other violation of the Act than the mere departure from the classification.

The Commission fears that approval of these rates would be legislation on its part, apparently because it would be the final blow to classification as a control over minimum rates and a further weakening of its role as a "giant handicapper." Having permitted over a long period exceptional rates which actually move the vast preponderance of this traffic at rates below the class rates, it would seem that it has already effectually legislated or interpreted the modification of what it now claims was the original meaning and purpose of § 1(6). It is strange to find it boggling at this final step of so little effect on traffic actually moving under class rates. In any case, we do not agree that these rates are or ever were a violation of the language or intent of section 1(6). Commodity rates are sufficiently policed under sections 1(5); 2; 3(1); and 15a(3).[2] The record

[2] "§ 1, par. (5). "Just and reasonable charges. All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

"§ 2. Special rates and rebates prohibited

"If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

"§ 3, par. (1). "Undue preferences or prejudices prohibited. It shall be unlawful for any common carrier subject to the provi-

discloses no violation of these sections. It would appear that the Commission here invokes § 1(6) as a means of preserving a basis for the "value of service" concept in ratemaking referred to above, in a desire to hold fast to a past which has already slipped away beyond our reach.

This "value of service" principle was useful in the early years of the Interstate Commerce Act in requiring the more prosperous East to assist in the development of railroads and commercial and agricultural enterprises in the undeveloped West at a time when the existing railroads were powerful monopolies. In his opinion in New York, New Haven & Hartford R. Co. v. United States, 199 F. Supp. 635, 643 (D.C. 1961), vacated I. C. C. v. New York, N. H. & H. R. Co., 372 U.S. 744, 83 S. Ct. 1038, 10 L. Ed. 2d

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sions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

"§ 15a. Fair return for carriers

* * * * * * * * * * *

"(3) In a proceeding involving competition between carriers of different modes of transportation subject to this chapter and chapters 8, 12, 13 and 19 of this title, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this chapter and chapters 8, 12, 13 and 19 of this title.

108, Judge Hincks described the value of service concept as among the "official discriminations, hallowed and encrusted by time and inertia, (which) now pervade the rate structure." The continuing application of the principle is, however, contrary to the letter and spirit of the National Transportation Policy amendment to the Interstate Commerce Act, passed in 1940, 49 U.S.C. note preceding § 1, which, as its legislative history makes clear, was intended to permit the railroads, no longer effective monopolies, to respond to competition by asserting whatever inherent advantages of cost and service they possessed.

The Commission also concludes that the rates at issue constitute a destructive competitive practice under § 15a(3) of the Interstate Commerce Act. This term was meant to be applied only in the context of competition between different modes of transportation and not for the purpose of supporting the classification provisions of the Act. This phrase, in its proper area of application, was dealt with by this court in New York, New Haven & Hartford R. Co. v. United States, supra, [see also Missouri Pacific R. Co. v. United States, 203 F. Supp. 629, 634 (E.D. Mo. 1962)], as follows:

> "• • • the differential prohibition was intended to be qualified only when factors other than the normal incidents of fair competition intervened, such as a practice which would destroy a competing mode of transportation by setting rates so low as to be hurtful to the proponent as well as his competitor or so low as to deprive the competitor of the 'inherent advantage' of being the low-cost carrier. The 'inherent advantage' factor and the 'destructive competitive practice' factor were the only two policy factors mentioned in the committee reports. • • •"

The finding that the rates will be destructive of competition rests on a basis not entirely clear to us. It

would appear rather that they would enable the railroads "to respond to competition by asserting whatever inherent advantages of cost and service they possessed." The rates are admittedly compensatory, exceeding the out-of-pocket costs and in most instances making a substantial contribution to overhead. There is no finding based on evidence that the rates would destroy or impair the inherent advantages of other modes of transportation. The finding of destructive competition is not adequately supported on the present record.

The issues of this case should never have been framed under § 1(6) nor should the meaning of the National Transportation Policy, as referred to in § 15a(3), have been distorted to supplement it.

The order under review is annulled and set aside.

APPENDIX B

Filed Sep. 16, 1963

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. 9229

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY (Richard Joyce Smith, William J. Kirk, and Harry W. Dorigan, Trustees), et al., *Plaintiffs*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants*

Judgment

This cause having been heard on the plaintiff's complaint under 28 U.S.C. §§ 1336, 1398, 2284 and 2321-2325, and 5 U.S.C. § 1009, seeking to enjoin, set aside, and annul a report and order of the Interstate Commerce Commission

dated December 28, 1961 in Investigation and Suspension Docket No. 7131, *All Commodities from New England to Chicago and St. Louis*, and related cases, to the extent that such report and order found unlawful and unreasonable certain freight rates as described therein; and the parties appearing by counsel having been heard and the issues duly tried; and the Court having concluded in its opinion that plaintiffs are entitled to judgment:

It is hereby Ordered, Adjudged and Decreed that the above described report and order of the Interstate Commerce Commission entered December 28, 1961, to the extent that certain freight rates, more specifically described therein, were found unlawful, be annulled and set aside in accordance with the opinion of this Court, and that the United States or the Interstate Commerce Commission, or their agents or employees, are hereby enjoined from enforcing them.

Issued at New Haven, Connecticut, this 16th day of September, 1963.

J. Joseph Smith
U.S.C.J.

Robert P. Anderson
U.S.D.J.

M. Joseph Blumenfeld
U.S.D.J.

APPENDIX C

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET No. 7131[1]

ALL COMMODITIES FROM NEW ENGLAND TO CHICAGO AND ST. LOUIS

Decided December 28, 1961

Reduced all-freight rates, in straight or mixed shipments, from points in New England to Chicago and East St. Louis, Ill., Gibson and Hammond, Ind., and St. Louis, Mo., found unjust and unreasonable. Findings in prior report, 313 I.C.C. 275, reversed. Unlawful rates ordered canceled, and proceedings discontinued.

Appearances as shown in prior report and, in addition: *Homer S. Carpenter* and *John S. Fessenden* for interveners in support of protestant.

REPORT OF THE COMMISSION ON RECONSIDERATION

HERRING, *Commissioner:*

In the prior report, 313 I.C.C. 275, division 2 found that reduced boxcar rates[2] on all freight, with a few exceptions,[3]

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[1] This report embraces also No. 33185, All Freight from Connecticut, Massachusetts, and Rhode Island to Chicago and St. Louis; No. 33193, Freight, All Kinds, from Maine to Chicago and East St. Louis, Ill.; No. 33202, All-Freight Rates from New England to Illinois, Indiana, and Missouri; and No. 33269, All articles from Windsor, Vt., to East St. Louis, Ill., and St. Louis, Mo.

[2] Rates, charges, and costs are stated per 100 pounds.

[3] Perishable freight, livestock, military equipment, explosives, scientific equipment, and every commodity with a loss and damage expense in excess of 8.747 cents per 100 pounds as indicated in public statement No. 5-58, prepared by the Commission's cost finding section.

in straight or mixed carloads, from points in New England territory to Chicago and East St. Louis, Ill., Gibson and Hammond, Ind., and St. Louis, Mo., were just and reasonable. Ten individual motor carriers,[4] members of the protestant Eastern Central Motor Carriers Association, Inc., intervened in these proceedings in support of the protestant. Upon petition of the protestant and interveners, and reply thereto by the New York, New Haven and Hartford Railroad Company, referred to herein as the respondent or the New Haven, we reopened these proceedings for reconsideration on the record as made. The facts stated in the prior report will be repeated only where necessary for a clear understanding of the issues.

Division 2, acting as an appellate division, vacated the order of suspension in the title proceeding, but continued the investigation. Since the schedules in the embraced proceedings were not suspended, all of the considered rates have become effective. Nevertheless, for convenience, they will sometimes be referred to herein as proposed rates.

The rates under investigation were published in section 2 of a tariff embodying all-freight boxcar rates. They alternate with the previously established all-freight boxcar rates contained in section 1 of the tariff, depending on which produces the lowest charge. Section 1 rates apply only on mixed shipments of at least five commodities, with no one commodity exceeding 50 percent of the total consignment. The New Haven was the only respondent to present evidence in support of these rates. On brief, the respondents Boston and Maine Railroad, Maine Central

[4] All States Freight, Inc., Chicago Express, Inc., Eastern Express, Inc., Long Transportation Company, W. L. Mead, Inc., Ramus Trucking Line, Inc., Roadway Express, Inc., Spector Freight System, Inc., The Western Express Company, and Wilson Freight Forwarding Company intervened for the purpose of filing a joint petition for reconsideration with protestant Eastern Central Motor Carriers Association, Inc.

Railroad Company, and The New York Central Railroad Company stated that their only reason for joining in these rates was to remain competitive with the New Haven.

The proposed (section 2) rates are scaled to weight minima which range in 10,000-pound increments from 20,000 pounds to 70,000 pounds. They apply on service in boxcars only, and no transit privileges requiring the use of more than one car per shipment are permitted. They exclude import-export or ex-water traffic, and the 20,000- and 30,000-pound rates are limited to movements in cars not exceeding 40 feet 7 inches in length. Representative rates from Boston to Chicago range from 213 cents, minimum 20,000 pounds, to 90 cents, minimum 70,000 pounds, and represent from 45 to 19 percent of first class. Since the proposed rates are not subject to a mixing rule, it appears that they represent the highest level at which the bulk of the New Haven's westbound traffic would move.

The New Haven's stated purposes in establishing the section 2 rates are to attract and retain high grade tonnage which might otherwise move by truck and compete with plan III trailer-on-flatcar (TOFC) service. The plan III rates are published as charges per maximum consignment of 70,000 pounds, in no more than two trailers on one flatcar. Under the TOFC rates, the shipper must furnish the trailers. However, these rates are subject to a mixing rule which requires that no one commodity may comprise more than 60 percent of the total shipment.

The respondent has been unable to compete effectively for the plan III traffic because of its general shortage of cars and because of physical clearance problems when handling high-cube trailers. Within 2 months after the establishment of the plan III service on July 21, 1958, the New Haven lost the equivalent of over 400 boxcar loads of this traffic to the New York Central. The New Haven subsequently improved its facilities so that at the time of the

hearing herein it could participate in plan III service over its Maybrook gateway.

A survey was made by the New Haven of all the traffic moving from origins on its lines at the section 2 rates to these destinations on and between July 16 and September 30, 1959. There were 364 shipments, 186 of which originated at Boston, Mass. The study shows the total revenues resulting from the section 2 rates, and what the revenues would have been had the traffic moved under the section 1 boxcar rates. The shipments were segregated into (*a*) traffic that previously moved in boxcars, (*b*) traffic that previously moved partly by rail and partly by other modes of transportation, and (*c*) traffic that previously moved by other than rail transportation, as indicated in the following table:

	Number of cars	Rated weight	Revenue	Average weight per car	Average revenue per car
		Pounds		*Pounds*	
At section 2 proposed rates:					
Group (a)	255	12,296,077	$144,709.86	48,220	$567.49
Group (b)	67	3,725,627	38,182.03	55,606	569.88
Group (c)	42	2,430,664	24,522.26	57,873	583.82
Total	364	18,452,368	207,414.15	50,693	569.82
At section 1 boxcar rates:					
Group (a)	255	11,648,857	178,529.42	45,682	700.11
Group (b)	67	3,621,435	57,511.39	54,051	858.37
Group (c)	42	2,359,062	33,756.22	56,168	803.71
Total	364	17,629,354	269,797.03	48,432	741.20

The study shows also that 50 percent of the group (b) traffic formerly moved at the section 1 rates, and had it continued to do so, would have yielded $28,755.69 in revenue. On the basis of these calculations, the traffic previously handled by the New Haven would have yielded, under the section 1 rates, total revenue of $178,529.42 and $28,755.69, or $207,285.11, which is $129 less than the total revenue of $207,414.15 under the section 2 rates from all of the 364

shipments. Thus, for this period, the respondent moved over 4 million pounds of additional traffic in return for $129 in added revenue. This represents less than one-third of a cent in revenue for each additional 100 pounds of traffic moved.

The cost evidence of record, based on average eastern-district costs, indicates that the section 2 rates exceed the out-of-pocket costs, and in most instances make a substantial contribution to overhead. The findings in the prior report were based primarily on the apparent compensativeness of the proposed rates. It appears to us, however, that a more serious aspect of these proceedings and one which is of primary importance here, is the alleged violation of section 1(6) of the act and its effect upon the general rate structure.

Section 1(6), to the extent here pertinent, reads as follows:

> It is hereby made the duty of all common carriers subject to the provisions of this part to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations or practices are or may be made or prescribed, * * * and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

The New Haven asserts that this paragraph of the act was enacted to protect the shipper from abuses arising from a lack of competition. It is argued that there is justification for these section 2 rates, since commodity rates which are not based solely on the usual classification principles are lawful where the movement of traffic is frustrated at higher rate levels.

All-commodity rates.—Historically, all-commodity rates were first published in official territory in 1932. They re-

flected 70 percent of the first-class rates as prescribed in *Eastern Class Rate Investigation*, 164 I.C.C. 314, and subsequent reports, and were published to compete with container rates on less-than-carload traffic. The all-commodity rates were subject to a 30,000-pound minimum, while the minimum weight for a single container was only 4,000 pounds. Subsequently, additional all-commodity rates were established in and between most of the ratemaking territories on the basis of from 40 to 70 percent of first class. In certain instances they went below 40 percent of first class, chiefly in order to meet TOFC competition. In August of 1949, the railroads in official territory established 50 percent of first class as the maximum basis for all-commodity rates because they were losing a considerable amount of forwarder traffic. Shortly thereafter, this basis was reduced to 45 percent.

Since 1932, numerous all-commodity or all-freight rail rates at varying percentages of first class have been established throughout the Nation. Generally, however, they have applied on a limited number of commodities and require the mixing of two or more commodities. The primary purpose was and is to move less-than-carload traffic in carload quantities at a savings to both the carriers and the shippers. All-commodity rates in mixed carloads have usually reflected the average carload rate basis for the commodities covered, thereby adhering to, rather than departing from, classification principles by classifying a mixture of freight in carload quantities.

Discussion and conclusions.—As stated, the proposed rates apply on straight as well as mixed shipments, and on a vast number of commodities. The New Haven relies heavily on *All Freight to Pacific Coast*, 248 I.C.C. 73, wherein it was held that all-commodity rates on straight or mixed shipments did not violate section 1(6). However, in that proceeding, the all-commodity rates were no lower than the carload commodity rates which otherwise

would have applied. In a few other proceedings we have approved all-commodity rates which were not limited to mixed shipments, but there again the all-commodity rates were at the same level as, or higher than, the carload commodity rates.[5] It is thus clear that approval of all-commodity rates in those proceedings did not represent approval of departures from the "classification" required by section 1(6) of the act. On the other hand, the application of all-commodity rates on shipments of single high-grade commodities was condemned in *Merchandise to and from Chicago*, 66 M.C.C. 287, and in *Freight, All Kinds, Kansas City, Mo.-Kans., to Nebraska*, 310 I.C.C. 321.

The maintenance of class rates is quite different from the "classification of property" required by section 1(6). While it was never intended that class rates must be applied on all traffic, the plain language of section 1(6) requires the maintenance of a classification of property with the establishment of rates related thereto. Exceptions rates and commodity rates do not represent departures from the classification of property because such rates are established on specific commodities or groups of commodities to meet particular transportation conditions. This is true also of classification rule 10 for mixed shipments, or variations thereof, moving at single rates and minimum weights, to which all-freight and all-commodity rates are closely akin. While such rates ignore to some extent the individual commodity classifications, they are a necessary and established part of the national rate structure, and thus may appropriately be regarded as a reasonable separate category of classification, provided always that such rates are so restricted as not to undermine seriously any just and reasonable rate adjustment.

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[5] See also, *All Freight from Butte, Mont., to Spokane, Wash.*, 251 I.C.C. 291, and *All Freight from Chicago and St. Louis to Birmingham*, 226 I.C.C. 455.

The rates here under investigation, however, apply not only on mixed but also on straight shipments of numerous commodities which would otherwise be subject to higher rates. Thousands of commodities are included in this sweeping adjustment without relation to classification principles, and without regard to the destructive effect which the proposed rates would have upon just and reasonable rate structures necessary to the maintenance of an adequate national transportation system. If not restricted to reasonable mixtures, such rates could, and no doubt would, break down these rate structures to the detriment of carriers and shippers alike. The evidence is clear that such result would follow approval of the proposed rates. In these circumstances, the rates must be condemned as constituting a destructive competitive practice in contravention of the national transportation policy, and also as in violation of section 1-(6) of the act.

For purposes of clarification, we wish to emphasize that just and reasonable classifications for commodity rates may bear little, if any, resemblance to the classifications observed in orthodox class-rate adjustments, for the reason that commodity rates usually reflect material transportation circumstances and conditions, especially market and carrier competition, which are not reflected in class-rate structures. We have in mind the necessity for variations in commodity-rate levels depending upon the character of the traffic and the circumstances affecting the transportation in particular situations.

Convincing proof that congressional policy requires just and reasonable classifications of freight for all ratemaking purposes—not just class rates—will be found in the Hoch-Smith Resolution, 49 U.S.C. 55, (adopted January 30, 1925, and still in effect) and in the analysis of that resolution by the Supreme Court in *Ann Arbor R. Co. v. United States*, 281 U.S. 658. The second paragraph of that resolution directed the Commission to investigate the

rate structure to determine the extent and manner that existing rates and charges imposed undue burdens or gave undue advantage as between, among other things, "the various classes of traffic, and the various classes and kinds of commodities * * *." In commenting on that paragraph of the resolution, the Court referred to the substantive provisions therein which required consideration of (*a*) the general and comparative levels in market value "of the various classes and kinds of commodities" as indicated over a reasonable period of years, (*b*) a natural and proper development of the country as a whole, and (*c*) the maintenance of an adequate system of transportation. These matters, the Court emphasized, "have all been regarded as factors requiring consideration under existing laws." The basic statutory standards of lawfulness are substantially the same today. Just and reasonable classifications of freight are also clearly contemplated by section 3(1), which prohibits undue preference or advantage to "any particular description of traffic, in any respect whatsoever."

It is true, of course, in carrier competitive situations, that a particular carrier or mode of carriage should not be required to forego traffic by observing classification principles that are ignored by its competitors, when the rate situation otherwise conforms to statutory ratemaking standards. It is equally true that proprietary and exempt carriage presents a special problem in this area of ratemaking.

The present statutory ratemaking standards in the act, particularly section 15a(3), are flexible enough to enable all regulated carriers and modes to maintain competitive rate adjustments, including the special situations resulting from proprietary and exempt carriage, provided such adjustments do not run counter to any of the basic standards of lawfulness in the act. The Commission's recognition of this clearly appears from its past decisions, and currently. By basic standards of lawfulness we mean the

standards of lawfulness in the act designed to protect the public interest in ratemaking, including especially those provisions which, since the inception of economic regulation, have required fair, just, and reasonable freight rates (for both carriers and shippers), and equality of treatment for people, commodities, and places, under substantially similar circumstances and conditions.

For the reasons stated earlier in this report, the competitive conditions confronting the respondents herein do not justify a finding that these all-freight rates in the form here proposed are just and reasonable. The hard problems presented by carrier competitive situations do not warrant the scuttling, or serious impairment, of the main ratemaking standards of the Interstate Commerce Act. The approval of this present proposal as lawful, bearing in mind its full implications, would in our judgment be a significant move in that direction.

This Commission, of course, has no authority to modify, enact, or nullify the Nation's transport laws. If all classifications must be disregarded with respect to all commodity and exceptions rates which move the great bulk of the Nation's commerce transported by regulated carriage, then Congress is the body that should be consulted in the matter.

Upon reconsideration, we find that the rates under investigation in these proceedings are unjust and unreasonable. An order will be entered requiring their cancellation and discontinuing the proceedings.

COMMISSIONER MCPHERSON, dissenting:

I would affirm the findings in the prior report.

COMMISSIONER WEBB, whom COMMISSIONER TUCKER joins, dissenting:

This report is a retrogressive step in the history of rate regulation. Twenty years ago the Commission decided

that all-commodity rates, not essentially different from those involved in these proceedings, did not violate section 1(6) of the Interstate Commerce Act. *All Freight to Pacific Coast*, 248 I.C.C. 73.[6] At no time during the intervening period has the validity of that precedent been questioned by the Commission.[7]

The report of the Commission in *All Freight to Pacific Coast, supra*, was written by Commissioner Aitchison. His opinion for the majority, the concurring expression of Commissioner Eastman, and the dissenting expressions of Commissioners Porter, Johnson, and Alldredge (with whom Commissioner Rogers joined) constitute an analysis of the basic problem which, in terms of penetration, lucidity, and forthright expression, is not likely to be surpassed. Although no such analysis is attempted in the report in these proceedings, it is clear that the majority has adopted the position unsuccessfully urged 20 years ago by Commissioner Alldredge.

The majority is correct in observing that the primary issue in these proceedings is the alleged violation of section 1(6) of the act. At the outset, some striking similarities between the rates proposed here and those considered in *All Freight to Pacific Coast, supra*, deserve mention. There, as here, the all-commodity rates were clearly compensatory. There, as here, the all-commodity rates were designed to halt the diversion of rail traffic by rail-truck, motor common carrier, and private transportation. There, as here, the all-commodity rates were not subject to a mix-

[6] On appeal, the Commission's decision was affirmed. *Pacific Inland Tariff Bureau* v. *United States*, 50 F. Supp. 376 (W.D. Wash., 1943).

[7] The two cases relied upon by the majority to support its conclusion, *Merchandise to and from Chicago*, 66 M.C.C. 287, and *Freight, All Kinds, Kansas City, Mo.-Kans., to Nebraska*, 310 I.C.C. 321, do not discuss section 1(6), its counterpart, section 216(b), or *All Freight to Pacific Coast, supra*.

ing rule; applied only on shipments in one direction; did not apply on various commodities; and resulted in the movement of a large volume of freight which had moved on specific commodity rates lower than the class rates. And there, as here, the all-commodity rates were found to have produced an increase in volume of traffic which was largely offset by the lower all-commodity rate level. However, the majority does not find that the proposed rates would harm the New Haven's competitors without benefiting the carrier, probably because there is no indication that the traffic actually moved under the proposed rates would have moved under the rates which would be superseded. The majority's finding with respect to destructive competition appears to be based solely upon its conclusion that the proposed rates would break down just and reasonable rate structures because of their departure from classification principles.

The only ground upon which the majority attempts to distinguish *All Freight to Pacific Coast, supra,* is that the all-commodity rates in that proceeding were no lower than the carload commodity rates which would otherwise have applied. So far as section 1(6) is concerned, that is a distinction without a difference. The respondents' carload commodity rates are just as foreign to the "classification" required by section 1(6) as their all-commodity rates.

The core of the majority's report is found in the following paragraph:

> The maintenance of class rates is quite different from the "classification of property" required by section 1(6). While it was never intended that class rates must be applied on all traffic, the plain language of section 1(6) requires the maintenance of a classification of property with the establishment of rates related thereto. Exceptions rates and commodity rates do not represent departures from the classification of property because such rates are established on specific

> commodities or groups of commodities to meet particular transportation conditions. This is true also of classification rule 10 for mixed shipments, or variations thereof, moving at single rates and minimum weights, to which all-freight and all-commodity rates are closely akin. While such rates ignore to some extent the individual commodity classifications, they are a necessary and established part of the national rate structure, and thus may appropriately be regarded as a reasonable separate category of classification, provided always that such rates are so restricted as not to undermine seriously any just and reasonable rate adjustment.

What this means is that the classification requirement of section 1(6) of the act applies not merely to class rates but to all rates—exceptions rates, commodity rates, classification rule 10 mixed shipments, and all-freight and all-commodity rates. The same broad interpretation of "classification" as used in section 1(6), was advanced by Commissioner Alldredge in his dissenting expression in *All Freight to Pacific Coast, supra,* at page 101:

> The significance of classification should be considered in its broadest sense, that is, as furnishing a comprehensive system for the distribution of the general rate burden and the establishment of rate relations, and, so regarded, it necessarily embraces commodity rates as well as so-called class rates.

These conclusions cannot be reconciled with those of the Commission in *All Freight to Pacific Coast, supra.* Speaking for the majority in that proceeding, Commissioner Aitchison observed at page 87:

> The public is primarily interested in the charge for the service, irrespective of whether a rate is stated as a class or commodity rate. All rates are required to be just and reasonable, nondiscriminatory and non-

prejudicial. To require carriers to maintain rates only on a classification basis would make section 1(6) paramount to all other sections of the act, particularly section 1(5), which requires all rates to be just and reasonable. * * *.

The majority concedes that just and reasonable classifications for commodity rates may bear little, if any, resemblance to the classifications observed in orthodox class-rate adjustments. Assuming, *arguendo*, that commodity rates and all-commodity rates constitute a "separate category of classification" within the meaning of section 1(6), it is obvious that the so-called classifications do not resemble the classifications which govern the application of class rates. All-commodity rates, for example, are made without regard to the value of the individual articles transported and without regard to the classification ratings of the individual commodities. It is even more difficult to view a commodity rate on shoes from point A to point B as a "separate category of classification" within the purview of section 1(6). But even when commodity rates involve some grouping of commodities, such a grouping is different in kind from the classification envisioned by section 1(6).

Apparently, the common denominator underlying the majority's all-inclusive interpretation of "classification" is a requirement that all rates must reflect, or at least must not offend, the value-of-service theory of ratemaking. The rationale of the report is the same as that expressed in the above-quoted statement of Commissioner Alldredge.

The majority's conclusion that all rates are governed by the classification requirement of section 1(6) is contrary to the fundamental principles of ratemaking which this Commission has recognized during the last 20 years. For example, Commissioner Eastman in *All Freight to Pacific Coast, supra,* at page 89, made the following observations

which he described as "elementary" and which he said "will enlighten no student of transportation charges":

> I think that the extent to which the weight given to value has made possible the publication of low rates for low-grade freight has been exaggerated, for often these low rates, by reason of low cost of service, are very remunerative. However, there is no doubt that it has made the rates on many commodities considerably higher than cost of service alone could have justified. And this is a fact which has nourished the competition which the railroads have encountered as motor transportation has developed. Such competition has in recent years brought about wholesale reductions in railroad rates which had been elevated in the past by the weight given to the element of value.

What Commissioner Eastman regards as elementary when the winds of competition were rising is even more elementary today when those winds have reached hurricane force. The legislative and historical background of section 1(6) leaves no doubt that the requirement of classification was intended to reinforce the Commission's power to establish maximum reasonable rates but not to prohibit or restrain competitively compelled departures from the classification.

Even before the enactment in 1887 of the Act to Regulate Commerce, the railroads maintained classifications of property. Even then the ratings were based primarily on the value of the service. Not until the enactment of the Mann-Elkins Act of June 18, 1910, however, were the carriers expressly required to make or observe a classification of property. Although the Commission, prior to 1910, had no specific authority to prescribe classifications of property, the power was exercised from the beginning of regulation because it was deemed essential to the effective exercise of its specific powers over rates. The nature of the implied power asserted by the Commission was described as fol-

lows on page 31 of its First Annual Report to the Congress:

> It was, therefore, seen not to be unjust to apportion the whole cost of service among all the articles transported, upon a basis that should consider the relative value of the service more than the relative cost of carriage. Such method of apportionment would be best for the country, because it would enlarge commerce and extend communication; it would be best for the railroads, because it would build up a large business, and it would not be unjust to property owners, who would thus be made to pay in some proportion to benefit received. Such a system of rate-making would in principle approximate taxation; the value of the article carried being the most important element in determining what shall be paid upon it.

In its Eighth Annual Report to the Congress, the Commission observed that "classification is the foundation of rate-making." By "classification" the Commission meant that rates should reflect to a large extent the value of the article transported; that is, that rates should be adjusted on principles analogous to those on which taxes are assessed. Despite the reservations later expressed concerning this method of ratemaking, there is no doubt that it was a practical method so long as the railroads held a virtual monopoly on transportation services.

It is clear that when the Congress enacted section 1(6) in 1910, it merely confirmed a power which the Commission had asserted under the Act to Regulate Commerce of 1887. The legislative history of section 1(6) shows that the express statutory requirement of a just and reasonable classification was intended to supplement the Commission's power to prevent excessive transportation charges. For example, the remarks of Representative Russell on H.R. 17536 were reported as follows:

> Another very beneficial provision of the law is one providing that the railway companies shall establish and enforce just and reasonable regulations concerning the rates and tariffs.
>
> I am not familiar with railway practices or rate sheets, or things of that kind, but I was told by a member of this House who has familiarity with them, a few days ago, that the shipper can be extorted from; he can be made to pay an unjust rate just as well through classification as he can through the fixing of a rate. The carriers can put an article in one classification, subject to a given rate, and if the I.C.C. sees fit to declare that rate unreasonable, and reduce it, declaring what shall be a reasonable rate to take its place, the carrying corporation can obtain the same benefit and put the shipper under the same disadvantage by simply changing the classification of the article.[8]

The Congress recognized, therefore, that the classification serves as a basis for the establishment of maximum reasonable rates and that value of service, in the sense used by the Commission prior to 1910, was the foremost consideration in establishing classification rates and ratings. For some years after 1910, the railroad monopoly was such that it was still possible for railroads to transport a substantial volume of freight on classification rates. And so long as railroads enjoyed even a semimonopolistic position, the classification required by section 1(6) could be regarded as the foundation of ratemaking. The change was gradual. By 1939, however, transportation conditions had changed so materially that the Commission observed at pages 26 and 27 of its 53d Annual Report:

> The fact that in many instances railroad freight rates have been considerably higher than cost of service would justify has obviously afforded better opportunities for competition than would otherwise have existed,

[8] 45 Cong. Rec. 5142 (1910).

and the trucks and water lines have not been slow in availing themselves of these opportunities.

* * * * * * * * *

It will be seen that the competition of today has been and is cutting the props from under the old railroad rate structure and the principles, if such they can be called, upon which it was based. The trucks have been eating into the remunerative short-haul traffic and into the highly profitable carload traffic in high-grade commodities which load well, and the water carriers and the pipelines have been taking their toll of much long-haul traffic. * * * Because of the competitive reductions, the railroad rate structure has come to be full of apparent distortions and inconsistencies, and has grown more complex.

In Docket No. 28300, *Class Rate Investigation, 1939*, 262 I.C.C. 447, the Commission found that only 5.8 percent of the carload traffic moved on class rates within official territory. In my judgment, the statutory requirement for just and reasonable classification is satisfied even though only a small portion of the total traffic moves on such rates. In other words, the requirements of section 1(6) are satisfied if a carrier maintains a classification as a compendium of maximum reasonable rates. The decision of the Supreme Court in *Ann Arbor R. Co.* v. *United States*, 281 U.S. 658 (1930) does not require a contrary conclusion. In the first place, that case arose during the transition from value-of-service pricing to cost-oriented methods of pricing. Secondly, the Commission's view that the Hoch-Smith Resolution was a rule intended to control ratemaking was repudiated by the Court. As a result, the *Ann Arbor* decision was widely regarded as virtually a nullification of the resolution. See Locklin, *Economics of Transportation*, 240 (5th ed. 1960).

The Commission did not hold in *All Freight to Pacific Coast, supra*, that section 1(6) is legally extinct. Only the

Congress is empowered to modify or repeal provisions of the act. On the contrary, at the very beginning of the discussion and conclusions in *All Freight to Pacific Coast, supra,* at page 86, Commissioner Aitchison pointed out:

> Respondents now maintain a full line of class rates governed by the western classification from and to all of the points involved in this proceeding, as required by section 1(6) of the Interstate Commerce Act.

Recently, in Docket No. 32533, *Eastern Central M. Carriers Assn.* v. *Baltimore & O. R. Co.*, 314 I.C.C. 5, 49, the Commission found: "The railroads maintain a uniform classification of property, and consistent with the conclusions previously cited,[9] we find that the assailed rates and charges do not constitute a failure to provide a just and reasonable classification under section 1(6) of the act." It cannot be denied that the respondents in these proceedings maintain a complete and uniform classification of property and a full line of class rates.

Since the majority's conclusion is basically indistinguishable from that reached by Commissioner Alldredge in *All Freight to Pacific Coast, supra,* it may be helpful to analyze his dissenting expression in the light of subsequent events.[10] Commissioner Alldredge's fundamental objection

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[9] *All Freight to Pacific Coast, supra,* and *All Freight Rates to Points in Southern Territory,* 253 I.C.C. 623, 631.

[10] Commissioner Alldredge's antipathy toward all-commodity rates is shown in his dissenting expressions in *All Freight Between Harlem River, N.Y., and Boston,* 234 I.C.C. 673; *All Freight, Chicago and St. Louis to Santa Rosa, N. Mex.,* 243 I.C.C. 517, and *All Freight Between Los Angeles and Albuquerque,* 28 M.C.C. 161. Of particular interest is the report of division 3 in which Commissioner Johnson, joined by Commissioner Alldredge, stated the case against all-commodity rates with great clarity and vigor. *All Freight from Eastern Ports to the South,* 245 I.C.C. 207. Upon reconsideration, however, following *All Freight to Pacific Coast, supra,* the case was disposed of on other grounds. 251 I.C.C. 361.

to all-commodity rates was that they violated the value-of-service theory of ratemaking which, in his opinion, the Commission was bound to respect both for economic reasons and in compliance with the intent of the Congress. Commissioner Alldredge's objections to all-commodity rates may best be summarized in his own words in *All Freight to Pacific Coast, supra,* at page 102:

> Basic objections, therefore, to all-commodity rates are:
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> • • • • • • • • • •
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> 3. Though such rates may have only a special and limited use, they must nevertheless be incorporated into *a general rate structure constructed upon classification principles,* thus creating incongruities, maladjustments, and a general lack of harmony that inevitably must lead to violations of the antidiscrimination provisions of the law. [Emphasis added.]
>
> 4. The general use of rates of this character, if it should be brought about, may be expected to have a disastrous effect upon the revenue of all transportation agencies. The application of one level of rates to all commodities without distinction as to value or other transportation characteristics is bound to reduce revenues by discouraging, hampering, and restricting the movement of the lower-grade commodities, and by sacrificing unnecessarily revenue on high-grade commodities. To reiterate, it is rudimentary that some articles, by their very nature, will stand a higher transportation charge than others. • • •

Today, the traditional concept of value-of-service pricing should not be regarded as an important factor in making rates. A distribution of the transportation burden among articles of commerce according to their value was reasonable in an era of monopoly but to require any such distribution today, except within very narrow limits, is unreal-

istic. Reduction of rates to meet widespread competition compels departure from ancient value-of-service principles. To conclude otherwise is to attribute to the Congress an intent to require the maintenance of classifications that would defeat the needs of commerce. Section 1(6) was intended to protect shippers from abuses arising from a lack of competition. Rates and ratings based on the classification may still be essential in fixing a ceiling on transportation charges, but where strong competition exists, other rates not based on the classification and not reflecting the value-of-service theory are essential to move the traffic involved. Motor common carriers are also aware of these economic facts of life. An examination of tariffs on file with the Commission will show that motor carriers are making extensive use of all-commodity rates not essentially different from those involved in these proceedings.

In recent months the Commission has warned the Congress and the general public concerning the decline of common carriage and the tremendous increase in the volume of traffic moving in unregulated channels of commerce. Appropriate legislative remedies have been suggested. A major element in the threat to common carriage is that the proprietary carrier is completely unaffected by classification principles. Value of service, as viewed by many shippers, is merely the value of common carrier service when compared with the cost of private transportation with whatever allowance is appropriate for differences in quality of service. Any program to cure the ailments of common carriers, coupled with a policy to tie rates to antiquated value-of-service theories, holds a promise to the ear which will be broken to the hope.

Two propositions form the cornerstone of Commissioner Alldredge's dissenting expression in *All Freight to Pacific Coast, supra.* The first is that "a general rate structure constructed upon classification principles" actually exists, and the second is that such a structure must be preserved in the interest of preventing violations of the antidiscrimi-

nation provisions of the act. The first proposition is less true today than it was 20 years ago while the second is just as invalid today as it was then. In the instant proceedings, the majority, in my opinion, has endorsed both propositions, as evidenced by the emphasis placed upon the necessity of preserving what is described as a just and reasonable national rate structure.

Generalizations regarding a matter so complex as the overall transportation rate structure are apt to be dangerous oversimplifications. Rate structures, so-called, are being shaped and reshaped to a progressively increasing extent by the impersonal forces of competition and to a progressively decreasing extent by the personal judgment of commissioners. To the extent that our national rate structure, so-called, has been molded by fair competition, I am satisfied that it is just and reasonable. This conclusion is based on my conviction that the impersonal judgment of the transportation marketplace can be relied upon to produce a national rate structure, so-called, that is far more just and reasonable than any product of economic planning.

Nevertheless, there is a factor which imparts rigidity to the national rate structure and that is the extent to which the structure is based on classification principles with value of service as the dominant element. To the extent that our national rate structure is constructed upon value-of-service considerations (except for the purpose of establishing maximum reasonable rates), it is, in my opinion, inherently unjust and unreasonable. Value-of-service pricing in transportation was initiated by railroad monopolists for the purpose of maximizing profits by discriminating against shippers of manufactured products. This system of price discrimination was accepted by the Commission in the early years of regulation because it furthered the Nation's general economic policy for developing the continent. In effect, shippers of high-valued commodities along the eastern seaboard were compelled to finance the extension of rail-

lines into the hinterland and thereafter to subsidize the less prosperous shippers who settled there. See Meyer, Peck, Stenason, Zwick, *The Economics of Competition in the Transportation Industries*, 179 (1958). Needless to say, the historical purpose of value-of-service rates was fulfilled many years ago.

In *New York, N. H. & H. R. Co.* v. *United States*, — F. Supp. —, civil action No. 8679 (D. Conn., Nov. 15, 1961), the court recognized that value-of-service ratemaking is "a price-discrimination device, used either to maximize profit or to subsidize certain interests." Nevertheless, the court also recognized in its discussion of value-of-service rates that "these official discriminations, hallowed and encrusted by time and inertia, now pervade the rate structure; indeed they are the rate structure." The question here is whether such a rate structure has become so rooted in commerce law that its reformation requires action by the Congress.

A good argument can always be made for the proposition that the settled policies of the Interstate Commerce Commission, whether the result of action or inertia, should be altered only by the Congress. The better view, in my opinion, is that the Congress, in delegating authority couched in such broad terms as "just and reasonable," intended the Commission to adjust its regulation in the light of changes in the industry and, whenever deemed necessary, to scuttle outmoded theories and practices without regard to their antiquity. Whatever policy is followed by the Commission, the Congress will decide whether the Commission was right or wrong in acting or in failing to act. The one great advantage, it seems to me, in an activist approach to transportation problems is that regulatory inertia and legislative lag are far more damaging in the long run than decisive regulatory action, granting, of course, that the action may not always be wise.